

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION  
No. 98-O-24**

DATE ISSUED: November 23, 1998

ISSUED TO: Garylle Stewart, Fargo City Attorney  
Dr. Vern Bennett, Superintendent, Fargo Public School  
District

**CITIZEN'S REQUEST FOR OPINION**

On September 17, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Patrick Condon on behalf of The Forum newspaper in Fargo asking whether the Fargo Youth Commission, Inc., violated N.D.C.C. § 44-04-18 by denying Mr. Condon's request for a copy of the corporation's budget for 1998.

**FACTS PRESENTED**

In late August and early September, 1998, the Fargo Youth Commission, Inc. (FYC), denied a request by Mr. Condon, a reporter for The Forum, for a copy of the FYC's 1998 budget. The FYC is a North Dakota nonprofit corporation formed in 1972 to establish and administer a youth program in the City of Fargo. Currently, the FYC operates a latchkey program during after-school hours at various public school locations in the City of Fargo. The school district does not charge the FYC rent for its use of school district property. The FYC also receives a \$7,500 grant from the City of Fargo for general support of the latchkey program, and payments from the North Dakota Children's Trust Fund to sponsor a series of classes to promote and strengthen the ties between parents and children.<sup>1</sup>

In response to an inquiry by this office, the FYC has indicated that it is willing to share its registry of deposits and withdrawals with Mr. Condon, and was willing to allow Mr. Condon to view a copy of the FYC budget at the FYC's office, but would not give Mr. Condon a copy of the budget. The FYC has also indicated that it has always been willing to release its records regarding how the FYC has used the public funds it has received, but argues that its budget is merely a

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<sup>1</sup> These payments of public funds are not so small or trivial that they would not constitute "support" under N.D.C.C. § 44-04-17.1(9). See 1998 N.D. Op. Att'y Gen. O-121, O-126 at n.4.

forecast of its income and expenses and is therefore not a "record" of how it has spent those funds.

#### ISSUES

1. Whether the Fargo Youth Commission, Inc., is a "public entity" subject to the state open records law.
2. Whether the budget of the Fargo Youth Commission, Inc., is a "record" required to be open to the public.

#### ANALYSES

##### Issue One:

The state open records law, N.D.C.C. § 44-04-18, requires that all "records" of a "public entity" be open to the public unless otherwise specifically provided by law. The definition of "public entity" includes organizations supported in whole or in part by "public funds." N.D.C.C. § 44-04-17.1(12)(c). "Public funds" means funds, including cash as well as other forms of property, received from the state or a political subdivision. N.D.C.C. § 44-04-17.1(13); 1998 N.D. Op. Att'y Gen. 0-121, 0-126. An organization is "supported" by public funds if it has received public funds exceeding the fair market value of any goods or services given to the public entity in exchange for those funds. Id.

Here, the information obtained by this office indicates that the FYC has received public funds from three sources. First, the Fargo Public School District gives the FYC rent-free use of school district property. Second, the City of Fargo has given annual grants to the FYC to support its latchkey program. Finally, the North Dakota Department of Human Services reimburses the FYC from the North Dakota Children's Trust Fund for specific services provided by the FYC. See N.D.C.C. ch. 50-27. The reimbursement the FYC receives from the Department of Human Services very likely does not constitute "support," 1998 N.D. Op. Att'y Gen. 103, but the FYC has not identified any specific goods or services it provides to the City of Fargo or the Fargo Public School District in exchange for the public funds it receives from those entities. Therefore, it is my opinion that the FYC is supported in part by "public funds" and is a "public entity" subject to the state open records law.

Issue Two:

Because the FYC is a public entity, the question becomes whether its budget is a "record" required to be open to the public.

"Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.

N.D.C.C. § 44-04-17.1(15)(emphasis added). "Public business" means all matters that relate or may foreseeably relate in any way to the public entity's use of public funds. N.D.C.C. § 44-04-17.1(11)(b).

Applying these definitions, the FYC's budget is an open record if it has been prepared for use in connection with, or contains information relating to, any matter which foreseeably relates to the FYC's use of school district property or the grant from the City. The rent-free use of school district property and the grant from the City of Fargo were given to the FYC for the general support of the FYC's latchkey program. The FYC argues that its records should only be open to the extent necessary to show how it spent the specific funds it received, which would not include its budget. However, this argument interprets the open records law too narrowly.

While it may be possible for the FYC to point to specific expenses that were paid with the funds it received from the City, disclosing records of those payments and expenses would not, by itself, reveal how the FYC used City funds, and would not reveal any information about the FYC's use of school district property for free. The public funds received by the FYC allowed it either to reduce income from other sources, such as the amount charged the parents who use the latchkey program, or to incur additional expenses that it otherwise could not have afforded. In either case, disclosure of the deposits and withdrawals by itself would not provide sufficient information to the public on how its funds have been used. An organization's use of public funds it has received for its general support can be fully determined only if those transactions are placed in context with the organization's overall finances.

The FYC reasonably points out that its budget is merely a forecast of anticipated income and expenses. However, as the FYC's financial game plan for its 1998 income and expenses, the budget relates to the finances of the latchkey program in general and the impact of the FYC's receipt of public funds in particular. Therefore, even if the information in the budget is speculative and outdated, it is my opinion that the budget is a "record" as defined in N.D.C.C. § 44-04-17.1(15). The FYC has not cited any exception to the open records law which would apply to its budget, and I am not aware of any applicable exception. Therefore, the budget is an open record under N.D.C.C. § 44-04-18 and a copy should have been provided to Mr. Condon upon request.

#### CONCLUSIONS

1. The Fargo Youth Commission is a "public entity" subject to the state open records law.
2. The budget of the Fargo Youth Commission is a "record" required to be open to the public.

#### STEPS NEEDED TO REMEDY VIOLATION

Because the budget is an open record, the FYC must provide a copy of the budget to Mr. Condon as he requested. Failure to do so within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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cc: Dan Plambeck, Attorney, Fargo Youth Commission